

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT

3 August Term, 2006

4 (Argued November 30, 2006

Decided May 4, 2007)

5 Docket No. 05-6962-cv

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7 COOSEMANS SPECIALTIES, INC.,

8 Plaintiff-Appellee,

9 COOSEMANS SPECIALTIES, INC., KATZMAN BERRY CORP., KATZMAN  
10 PRODUCE, INC., ROBERT MASHA SALES, INC. and TOP BANANA, L.L.C.,

11 Plaintiffs-Counter-Claimants-Appellees,

12 -v.-

13 JACK GARGIULO, JERRY BADER, MARKET SERVICE, INC., d/b/a  
14 ACCOUNTS RECEIVABLE MANAGEMENT SOLUTIONS, also d/b/a ARMS,  
15 TOP BANANA LLC, STATE OF NEW YORK and GRACE GARGIULO,

16 Defendants,

17 ALAN GARGIULO,

18 Defendant-Counter-Claimant,

19 ALAN J. GARGIULO, JR.,

20 Defendant-Intervenor-Defendant-Counter-Claimant,

21 PHILADELPHIA PRODUCE CREDIT BUREAU LLC,

22 Defendant-Intervenor-Defendant-Intervenor-Plaintiff-  
23 Counter-Claimant-Appellee,

24 BALDOR SPECIALTY FOODS, "R" BEST PRODUCE, INC. and PUTNAM  
25 PRODUCE INC.,

26 Defendants-Intervenors-Plaintiffs-Appellees,

1 SUPREME CUTS, EAST WEST FRESH FARMS, LLC, AFL FRESH & FROZEN,  
2 INC., B.T. PRODUCE CO., INC., D'ARRIGO BROS. CO. OF NEW YORK,  
3 INC., E. ARMATA INC., FIERMAN PRODUCE EXCHANGE INC., FRUITCO  
4 CORP., HUNTS POINT TROPICAL, INC., J&J PRODUCE CO., KLEIMAN &  
5 HOCHBERG, INC., MIKE SIEGEL INC., MORRIS OKUN, INC., NATHEL &  
6 NATHEL, INC., PAUL STEINBERG ASSOCIATES, INC., SQUARE PRODUCE  
7 CO., INC.,

8 Defendants-Intervenors-Plaintiffs-Counter-Claimants,

9 M. TROMBETTA & SONS, INC.,

10 Defendant-Intervenor-Plaintiff-Counter-Claimant,

11 ALAN J. GARGIULO, SR., a/k/a Jack Gargiulo, and DOM'S WHOLESALE &  
12 RETAIL CENTER, INC., a/t/a Dom's Wholesale Market,

13 Defendants-Intervenors-Defendants-Counter-Claimants-Appellants,

14 NARA BANK, N.A.,

15 Intervenor-Plaintiff,

16 PLATINUM FUNDING CORP.,

17 Intervenor-Plaintiff-Counter-Defendant.  
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19 Before: MESKILL, CARDAMONE and RAGGI, Circuit Judges.

20 Appeal from a judgment of the United States District  
21 Court for the Southern District of New York, Peck, Chief  
22 Magistrate Judge, entered on December 2, 2005, against corporate  
23 trustee and controlling person in action to recover amounts due  
24 on unpaid invoices, attorneys' fees and interest under the  
25 Perishable Agricultural Commodities Act, 7 U.S.C. § 499a et seq.

26 Affirmed.

27 PAUL T. GENTILE, Gentile & Dickler, New York, NY,  
28 for Defendants-Appellants.

1 JEFFREY M. CHEBOT, Whiteman, Bankes & Chebot, LLC,  
2 Philadelphia, PA,  
3 for Appellee Philadelphia Produce Credit Bureau,  
4 submitting on behalf of the Plaintiffs-  
5 Intervenors-Plaintiffs-Appellees.

6 Of Counsel:

7 Louis W. Diess, III, McCarron & Diess, Washington,  
8 D.C.,  
9 for Top Banana, LLC, Coosemans Specialties, Inc.,  
10 Katzman Berry Corp., Katzman Produce, Inc., Robert  
11 Masha Sales, Inc. and Supreme Cuts, LLC.

12 Leonard Kreinces, Kreinces & Rosenberg, Westbury,  
13 NY,  
14 for AFL Fresh & Frozen, Inc., E. Armata, Inc.,  
15 B.T. Produce Co., Inc., D'Arrigo Bros. Co. of New  
16 York, Inc., Fierman Produce Exchange, Inc.,  
17 Fruitco Corp., Hunts Point Tropical, Inc., J&J  
18 Produce, Nathel & Nathel, Inc., Morris Okun, Inc.,  
19 Mike Siegel, Inc., Square Produce Co., Inc.,  
20 Kleiman & Hochberg, Inc., Paul Steinberg  
21 Associates, Inc. and Redi Fresh Produce, Inc.

22 MESKILL, Circuit Judge:

23 This appeal examines the extent of personal liability  
24 of a Perishable Agricultural Commodities Act (PACA), 7 U.S.C.  
25 § 499e(c), trustee controlling person for entering into a  
26 factoring agreement resulting in a loss of trust assets for the  
27 trust beneficiaries and whether attorneys' fees are appropriate.<sup>1</sup>

28 Defendants Dom's Wholesale & Retail Center, Inc.  
29 (Dom's) and Alan J. Gargiulo, Sr. (Gargiulo), the President, sole

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<sup>1</sup> A factoring agreement allows a business to "convert[]  
receivables into cash by selling them at a discount" to a  
factoring company, thereby providing the business with immediate  
liquidity. E. Armata, Inc. v. Korea Commercial Bank of N.Y., 367  
F.3d 123, 133 (2d Cir. 2004) (alteration in original) (internal  
quotation marks omitted).

1 shareholder and sole director of Dom's, appeal from a judgment of  
2 the United States District Court for the Southern District of New  
3 York, Peck, Chief Magistrate Judge, awarding \$1,704,680.75 in  
4 principal, interest and attorneys' fees to plaintiffs and  
5 intervenor plaintiffs (collectively "plaintiffs" or "PACA trust  
6 beneficiaries"), who are unpaid sellers and suppliers of fresh  
7 produce with claims against defendants under the statutory trust  
8 provisions of PACA. Defendants assert that the district court  
9 erred when it held Gargiulo personally liable for Dom's PACA-  
10 related debts and awarded attorneys' fees to plaintiffs. We  
11 affirm.

#### 12 BACKGROUND

13 Plaintiffs filed suit against Dom's and Gargiulo in the  
14 Southern District of New York to enforce PACA's statutory trust  
15 provisions requiring produce buyers to hold perishable  
16 agricultural commodities, and receivables and proceeds from the  
17 sale of those commodities, in trust for the benefit of unpaid  
18 sellers until full payment has been made. 7 U.S.C. § 499e(c)(2).  
19 Plaintiffs sought to recover damages from both Dom's and Gargiulo  
20 for the principal amount due on unpaid invoices plus pre-judgment  
21 interest and attorneys' fees.

22 Platinum Funding Corporation (Platinum) subsequently  
23 intervened in plaintiffs' action, claiming that Dom's owes it  
24 over one million dollars pursuant to the factoring agreement

1 between them. Dom's and Gargiulo deny Platinum's allegations and  
2 assert that Platinum owes Dom's \$1,773,031 for breaching the  
3 factoring agreement. In addition, defendants contend that  
4 \$4,925,659 in unidentified accounts receivable were improperly  
5 "written off" by Platinum. The district court severed these  
6 disputed matters from plaintiffs' PACA claims. The disputed  
7 claims are pending.

8 Plaintiffs' motion for summary judgment was referred to  
9 Chief Magistrate Judge Peck, who recommended granting summary  
10 judgment to plaintiffs against both Dom's and Gargiulo for the  
11 principal amount in unpaid invoices plus interest and attorneys'  
12 fees. The magistrate judge concluded that (1) as Dom's sole  
13 shareholder, officer and director, Gargiulo should be held  
14 personally liable for dissipating the PACA trust assets, (2)  
15 exhaustion of Dom's assets (if any), that were tied up in  
16 litigation with Platinum, was not required prior to holding  
17 Gargiulo personally liable, and (3) plaintiffs were entitled to  
18 an award of attorneys' fees and interest based on language  
19 contained in their invoices. The district court adopted the  
20 magistrate judge's report and recommendation and granted summary  
21 judgment for plaintiffs. On the consent of the parties, the  
22 magistrate judge awarded plaintiffs \$1,704,680.75 in principal,  
23 interest and attorneys' fees in an order and final judgment  
24 pursuant to Fed.R.Civ.P. 54(b) certifying that there was no just

1 reason for delaying entry of final judgment against defendants.

2 On appeal, defendants concede that Dom's is liable for  
3 the principal amount and interest due on unpaid invoices, but  
4 challenge the district court's determination that Gargiulo is  
5 personally liable for Dom's PACA-related debts. Defendants also  
6 challenge the district court's award of attorneys' fees.

#### 7 DISCUSSION

8 Federal jurisdiction is based on the action being  
9 brought pursuant to PACA, a federal statute. See 7 U.S.C.  
10 § 499e(c) (5). We have appellate jurisdiction from the final  
11 judgment entered after the Fed.R.Civ.P. 54(b) certification.

12 We review the district court's grant of summary  
13 judgment de novo, viewing the evidence in the light most  
14 favorable to the nonmoving party. Greenidge v. Allstate Ins.  
15 Co., 446 F.3d 356, 360-61 (2d Cir. 2006). Summary judgment is  
16 proper only if "there is no genuine issue as to any material  
17 fact" and the moving party is "entitled to a judgment as a matter  
18 of law." Fed.R.Civ.P. 56(c). Because the relevant facts on this  
19 appeal are undisputed, we review only the district court's  
20 conclusions of law.

#### 21 A. PACA

22 We recently reviewed the history of PACA and its trust  
23 provisions in "R" Best Produce v. Shulman-Rabin Mktg. Corp., 467  
24 F.3d 238, 241-42 (2d Cir. 2006); see also Am. Banana Co. v.

1 Republic Nat'l Bank of N.Y., 362 F.3d 33, 36-38 (2d Cir. 2004).  
2 Congress enacted PACA in 1930 to regulate the interstate sale and  
3 marketing of perishable agricultural commodities. See Am. Banana  
4 at 36. The statute provides growers and sellers of agricultural  
5 produce with "a self-help tool enabling them to protect  
6 themselves against the abnormal risk of losses resulting from  
7 slow-pay and no-pay practices by buyers or receivers of fruits  
8 and vegetables." D.M. Rothman & Co. v. Korea Commercial Bank of  
9 N.Y., 411 F.3d 90, 93 (2d Cir. 2005) (alterations and internal  
10 quotation marks omitted). Under the relevant provision,  
11 perishable commodities or proceeds from the sale of those  
12 commodities are held in trust by the buyer for the benefit of the  
13 unpaid seller until full payment is made:

14 Perishable agricultural commodities received by a  
15 commission merchant, dealer, or broker . . . and any  
16 receivables or proceeds from the sale of such commodities  
17 . . . shall be held by such commission merchant, dealer,  
18 or broker in trust for the benefit of all unpaid  
19 suppliers or sellers of such commodities or agents  
20 involved in the transaction, until full payment of the  
21 sums owing in connection with such transactions has been  
22 received by such unpaid suppliers, sellers, or agents.

23 7 U.S.C. § 499e(c)(2). As a PACA trustee, a produce buyer is  
24 charged with a duty "to insure that it has sufficient assets to  
25 assure prompt payment for produce and that any beneficiary under  
26 the trust will receive full payment." D.M. Rothman, 411 F.3d at  
27 94 (internal quotation marks omitted). PACA affords produce  
28 sellers "a highly unusual trust beneficiary status that permit[s]

1 them, in the case of defaults, to trump the buyers' other  
2 creditors, including secured ones." Am. Banana, 362 F.3d at 38.

3 B. Personal Liability Under PACA

4 An individual who is in a position to control the  
5 assets of the PACA trust and fails to preserve them, may be held  
6 personally liable to the trust beneficiaries for breach of  
7 fiduciary duty. See Weis-Buy Servs. v. Paglia, 411 F.3d 415,  
8 420-21 (3d Cir. 2005); Patterson Frozen Foods v. Crown Foods  
9 Int'l, 307 F.3d 666, 669 (7th Cir. 2002); Golman-Hayden Co. v.  
10 Fresh Source Produce, 217 F.3d 348, 351 (5th Cir. 2000); Hiller  
11 Cranberry Prods. v. Koplovsky, 165 F.3d 1, 8-9 (1st Cir. 1999);  
12 Sunkist Growers v. Fisher, 104 F.3d 280, 282-83 (9th Cir. 1997);  
13 accord Bronia, Inc. v. Ho, 873 F.Supp. 854, 860-61 (S.D.N.Y.  
14 1995); Morris Okun, Inc. v. Harry Zimmerman, Inc., 814 F.Supp.  
15 346, 348-50 (S.D.N.Y. 1993). Gargiulo concedes that as Dom's  
16 President, sole shareholder and sole director, he was in a  
17 position of control over the PACA trust assets and that, as such,  
18 he can be held personally liable for any breaching of Dom's  
19 fiduciary duties. However, Gargiulo argues that he is not  
20 personally liable at this time because (1) he did not "dissipate"  
21 the PACA trust assets, and (2) plaintiffs have not exhausted  
22 Dom's corporate assets. We reject both arguments.

23 I. Dissipation of Trust Assets

24 PACA trustees "are required to maintain trust assets in

1 a manner that such assets are freely available to satisfy  
2 outstanding obligations to sellers of perishable agricultural  
3 commodities." 7 C.F.R. § 46.46(d)(1) (emphasis added). PACA  
4 regulations provide that "[a]ny act or omission which is  
5 inconsistent with this responsibility, including dissipation of  
6 trust assets, is unlawful." Id. "Dissipation" is defined as  
7 "any act or failure to act which could result in the diversion of  
8 trust assets or which could prejudice or impair the ability of  
9 unpaid suppliers, sellers, or agents to recover money owed in  
10 connection with produce transactions." Id. § 46.46(a)(2)  
11 (emphasis added). Thus, to determine whether a PACA trustee's  
12 actions or omissions constitute a breach of fiduciary duty, we  
13 examine whether the trustee "in any way encumbered the funds or  
14 rendered them less freely available to PACA creditors." D.M.  
15 Rothman, 411 F.3d at 99 (alterations and internal quotation marks  
16 omitted).

17 Defendants contend that they did not dissipate PACA  
18 trust assets because Dom's factoring agreement with Platinum was  
19 commercially reasonable and any loss of assets was due solely to  
20 Platinum's breach of the agreement. We have held that a PACA  
21 trustee does not commit a per se breach of fiduciary duty when  
22 trust funds are used to conduct a commercial transaction with a  
23 non-PACA party. E. Armata, Inc. v. Korea Commercial Bank of  
24 N.Y., 367 F.3d 123, 133 (2d Cir. 2004) (citation omitted).

1 Armata was a PACA suit against a third-party bank that charged  
2 fees for maintaining a checking account for the PACA trustee  
3 produce buyer. Id. at 126-27. The PACA trustee was not a  
4 defendant in that suit. Id. at 127. The Armata Court was only  
5 concerned with the liability of the third-party bank. Id. We  
6 determined that, in order to hold a third-party transferee in  
7 breach of trust for receipt of PACA funds there first must be a  
8 determination that the transfer of funds itself to the bank was  
9 in breach of trust. Id. at 128-29. It was in that setting that  
10 we held that a PACA trustee's payment of "commercially  
11 reasonable" interest and fees in support of its duty to maintain  
12 trust assets as "freely available" to repay its PACA creditors  
13 does not constitute a breach of trust under PACA. Id. at 134.  
14 We noted that there was nothing unusual about having funds  
15 available for PACA creditors without some relationship with a  
16 bank. Id. We remanded in Armata for the district court to  
17 determine in its analysis of the facts the commercial  
18 reasonableness of the agreement between the PACA trustee and the  
19 bank. Id. We declined to hold that no breach of a PACA trust  
20 can occur with respect to funds that are eventually paid to PACA  
21 creditors. Id. at 131.

22 We have never held that a PACA trustee can escape all  
23 liability for entering into a transaction that results in a large  
24 loss of PACA assets merely by showing that the transaction was

1 commercially reasonable on its face. Nothing in E. Armata  
2 suggests that, simply by entering into a commercially reasonable  
3 transaction, a PACA trustee necessarily avoids breaching its  
4 fiduciary duty. Instead, whether a transaction is commercially  
5 reasonable is simply one factor that may be relevant in  
6 determining whether a PACA trustee has met its ultimate burden of  
7 proving that trust assets remained freely available to  
8 plaintiffs. We hold that regardless of whether the factoring  
9 agreement in this case was commercially reasonable on its face,  
10 defendants are, as a matter of law, liable to plaintiffs because  
11 the factoring agreement here, unlike the banking agreement in  
12 Armata, was with a party having arguable claims of more than one  
13 million dollars against the PACA trustee. Thus, there can be no  
14 factual dispute that the factoring agreement jeopardized the  
15 trust funds and made them unavailable for timely payment to  
16 plaintiffs. See Bronia, 873 F.Supp. at 861 ("Relinquishing  
17 control of the commodities without securing payment is  
18 dissipation of the trust assets." (internal quotation marks  
19 omitted)). Unlike Armata, where summary judgment was improper  
20 because the commercial reasonableness of the agreement with the  
21 bank had not been determined, 367 F.3d at 134, an examination of  
22 all the pleadings in our case makes clear that the district  
23 court's determination that the agreement with Platinum  
24 jeopardized the PACA trust assets was correct. There being no

1 material factual issue in dispute, summary judgment was proper.

2 II. Exhaustion of Corporate Assets

3 Gargiulo, as PACA trustee, failed to preserve the trust  
4 assets, thus rendering him personally liable to plaintiffs. See  
5 Morris Okun, 814 F.Supp. at 348 (noting that PACA imposes  
6 liability on a trustee "who uses the trust assets for any purpose  
7 other than repayment of the supplier," including the use of trust  
8 assets "for legitimate business expenditures, such as the payment  
9 of rent, payroll, or utilities" (emphasis added)). However,  
10 Gargiulo argues that the district court prematurely held him  
11 personally liable because Dom's assets have not been exhausted.  
12 According to Gargiulo, Dom's assets include more than one million  
13 dollars that Platinum owes Dom's under the factoring agreement  
14 and millions of dollars in uncollected accounts receivable.

15 Gargiulo cites cases from other circuits holding that  
16 under PACA the corporate trustee is primarily liable and that  
17 "others may be held secondarily liable if they had some role in  
18 causing the corporate trustee to commit the breach of trust."  
19 Golman-Hayden, 217 F.3d at 351; see also Sunkist Growers, 104  
20 F.3d at 283. Gargiulo argues that these cases require PACA trust  
21 beneficiaries to await the results of Dom's collateral litigation  
22 and collection efforts before they can hold him personally  
23 liable. We disagree. To hold Gargiulo, the person in control of  
24 the trust assets, liable, plaintiffs need only show that "the

1 assets of the licensed commission merchant, dealer, or broker are  
2 insufficient to satisfy the PACA liability.” Golman-Hayden, 217  
3 F.3d at 351. When PACA trust assets are tied up in litigation,  
4 or in the form of uncollected accounts receivable, they are  
5 insufficient to satisfy the PACA liability because they are not  
6 “freely available” for “prompt payment” to trust beneficiaries as  
7 the PACA regulations require. 7 C.F.R. § 46.46(d)(1), (e).  
8 Accordingly, we agree with the district court that plaintiffs  
9 need not wait for the conclusion of Dom’s litigation or  
10 collection efforts before seeking recovery directly from  
11 Gargiulo.

### 12 III. Attorneys’ Fees

13 Defendants’ final argument concerns the district  
14 court’s award of plaintiffs’ attorneys’ fees. Defendants do not  
15 appeal the district court’s award of interest on the principal.  
16 The district court held that the invoices plaintiffs sent to  
17 defendants providing for the recovery of attorneys’ fees in the  
18 event of non-payment were enforceable against defendants. On  
19 appeal, defendants argue that the attorneys’ fees provisions in  
20 the invoices are unenforceable because the parties never  
21 discussed or agreed to them. Moreover, defendants argue that for  
22 Gargiulo to be held personally liable for plaintiffs’ attorneys’  
23 fees they must be included as part of the PACA trust.

24 As the district court properly noted, “additional terms

1 are to be construed as proposals for addition to the contract.”  
2 N.Y. U.C.C. § 2-207(2). Defendants do not dispute that New York  
3 law is controlling. When the parties are two merchants, the  
4 additional terms become part of the contract unless the party  
5 opposing those terms can establish one of three exceptions: “(a)  
6 the offer expressly limits acceptance to the terms of the offer;  
7 (b) they materially alter it; or (c) notification of objection to  
8 them has already been given or is given within a reasonable time  
9 after notice of them is received.” Id. The only exception at  
10 issue in this case is whether the attorneys’ fee provision in  
11 plaintiffs’ invoices “materially alter[ed]” the terms of their  
12 contracts with Dom’s. As the party opposing the inclusion of  
13 additional terms, Dom’s bears the burden of proving that the  
14 attorneys’ fees provision in plaintiffs’ invoices was a material  
15 alteration. See Bayway Ref. Co. v. Oxygenated Mktg. & Trading  
16 A.G., 215 F.3d 219, 223 (2d Cir. 2000).

17 Under New York law, a “material alteration is one that  
18 would ‘result in surprise or hardship if incorporated without the  
19 express awareness by the other party.’” Id. at 224 (quoting N.Y.  
20 U.C.C. § 2-207 cmt. 4).<sup>2</sup> We have noted that surprise includes

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<sup>2</sup> We have not yet decided whether hardship alone constitutes an independent basis for finding that an additional term materially alters a contract. See, e.g., Aceros Prefabricados, S.A. v. TradeArbed, 282 F.3d 92, 101 (2d Cir. 2002). We need not decide that issue here because defendants have failed to argue that they have suffered hardship. See Bayway Ref., 215 F.3d at 226.

1 "both the subjective element of what a party actually knew and  
2 the objective element of what a party should have known." Id.  
3 "To carry the burden of showing surprise, a party must establish  
4 that, under the circumstances, it cannot be presumed that a  
5 reasonable merchant would have consented to the additional term."  
6 Id. As the district court concluded, defendants failed to offer  
7 any evidence to demonstrate either objective or subjective  
8 surprise over the attorneys' fee provision in plaintiffs'  
9 invoices.

10 Finally, the district court adopted the magistrate  
11 judge's report and recommendation finding that defendants  
12 conceded that attorneys' fees can be included in the PACA trust.  
13 Defendants now seek to withdraw that concession, asserting in  
14 their reply brief that Gargiulo cannot be held personally liable  
15 for plaintiffs' attorneys' fees because the fees in this case are  
16 not part of the PACA trust. Defendants have waived this argument  
17 because (1) they failed to object to the magistrate judge's  
18 purported error that they conceded the issue, see Cephias v. Nash,  
19 328 F.3d 98, 107 (2d Cir. 2003) (noting that "a party's failure  
20 to object to any purported error or omission in a magistrate  
21 judge's report waives further judicial review of the point"), and  
22 (2) defendants raised this argument for the first time in their  
23 reply brief, see F.T.C. v. Verity Int'l, Ltd., 443 F.3d 48, 65  
24 (2d Cir. 2006) ("Because the defendants-appellants did not

1 contest the district court's . . . determination until their  
2 reply brief, and then only cursorily, we deem it waived on  
3 appeal.").

4           Putting aside the waiver issue, we agree with our  
5 sister circuits that where the parties' contracts include a right  
6 to attorneys' fees, they can be awarded as "sums owing in  
7 connection with" perishable commodities transactions under PACA.  
8 7 U.S.C. § 499e(c)(2). See Country Best v. Christopher Ranch,  
9 LLC, 361 F.3d 629, 632 (11th Cir. 2004); Middle Mountain Land &  
10 Produce v. Sound Commodities, 307 F.3d 1220, 1222-25 (9th Cir.  
11 2002); see also Movsovit & Sons of Fla. v. Axel Gonzalez, Inc.,  
12 367 F.Supp.2d 207, 215 (D.P.R. 2005); JC Produce v. Paragon  
13 Steakhouse Rests., 70 F.Supp.2d 1119, 1123 (E.D. Cal. 1999).  
14 Accordingly, because plaintiffs' invoices created an enforceable  
15 contract providing for attorneys' fees, Gargiulo is personally  
16 liable to plaintiffs for those fees as "sums owing in connection  
17 with" perishable commodities transactions under PACA.

18           We agree with the district court that plaintiffs'  
19 invoices providing for attorneys' fees created an enforceable  
20 contract entitling plaintiffs to recover those fees from  
21 defendants as "sums owing in connection" with perishable  
22 commodities transactions under PACA. We also agree with the  
23 district court that Gargiulo is personally liable to plaintiffs  
24 at this time because Gargiulo was in a position of control over

1 the PACA trust assets and dissipated those assets, and sufficient  
2 corporate assets of Dom's were not "freely available" to  
3 plaintiffs.

4           Accordingly, the judgment of the district court entered  
5 on December 2, 2005, awarding \$1,704,680.75 in principal,  
6 interest and attorneys' fees to plaintiffs under the Perishable  
7 Agricultural Commodities Act, 7 U.S.C. § 499a et seq., is  
8 affirmed.